United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2304

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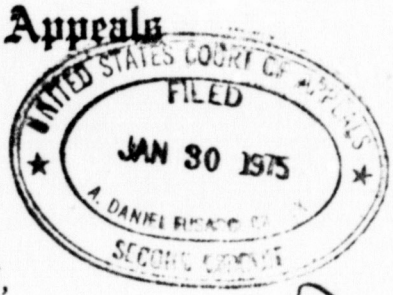
United States Court of Appeals

SECOND CIRCUIT



Docket No. 74-2304

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

REPLY BRIEF OF APPELLANT A/S ARCADIA, DEFENDANT AND "PLAINTIFF" SEEKING JOINDER

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellant

J. WARD O'NEILL
JOSEPH T. STEARNS
RICHARD A. CORWIN
Of Counsel

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REPLY BRIEF OF APPELLANT A/S ARCADIA, DEFENDANT AND "PLAINTIFF" SEEKING JOINDER

We reply to the answering brief of the involuntary plaintiff-appellee, Gulf Insurance Company, in order to correct the total distortion of the shipowner's argument which is presented therein. We take Gulf's points in order.

REPLY TO POINT I OF GULF'S ANSWERING BRIEF

The shipowner does not, in this case, rely on the "Murray Credit" doctrine as is claimed in Point I of the Answering Brief.

A "Murray Credit" allows a fifty percent reduction of a judgment obtained by a compensated employee against a negligent third party. Justification for this result is founded (we speak of an uncomplicated case where only one third party's negligence causes an accident which is also caused by employer's negligence) on the belief that the employee/plaintiff has two claims, one for compensation against his employer and a second for "damages" against the third party. Recourse to compensation is treated as a settlement of one cause of action, entitling the remaining (third) party to be treated as one of two tortfeasors who is, therefore, obligated for only one half of the plaintiff/employee's damages. See *Martello* v. *Hawley,* 300 F. 2d 721, (U. S. C. A. D. C. 1962). This means that plaintiff receives less than his full damages, which is said to be a fair exchange for the certainty of recovery of compensation. For example, if a plaintiff obtains a verdict of $10,000 when he has been injured in the proposed joint negligent situation and has received $4,000 in compensation, the third party pays $5,000, as the doctrine has been applied in non-maritime cases. It also means, of course, that the employer does not recover its "lien." The difficulty with this result is that, as illustrated, the employee concedes $1,000 although apparently guaranteed otherwise by 33 USC §§ 908, 905(b) and

933(b). To our knowledge the "Murray Credit" doctrine has never been applied in a maritime case. See *Turner* v. *Excavation Construction Inc.,* 324 F. Supp. 704 (D. C. D. C. 1971) where the court refused to extend the doctrine because of the Supreme Court's holding in *Pope & Talbot* v. *Hawn,* 346 U. S. 406 (1953), which we argued in the main brief has been overruled.

Since filing of the main brief an additional opinion bearing on the issues presented here has come to our attention. *Shellman* v. *United States Lines Operators Inc.* (Civil No. CV73-1902-R) (U. S. D. C., C. D., Ca., Op. filed Nov. 25, 1974, not yet reported, See Appendix pp. 1a-12a, *infra*). In that case a longshoreman injured aboard a U ited States Lines' vessel subsequent to the amendments to the Act brought suit against the shipowner alleging that it had negligently caused a shipboard injury. In answer to plaintiff's complaint, the defendant shipowner pleaded the so-called "Murray Credit" doctrine. Plaintiff, because of the impact of the doctrine on his claim, moved to dismiss this defense, and the insurer of plaintiff's employer, the contract stevedore, intervened in order to assert its interest in compensation payments made to plaintiff. With the case in that posture, the Court dismissed the shipowner's "Murray Credit" defense but held as follows:

> 1. That the stevedore's insurer may not pursue its compensation "lien" since there had been no statutory assignment of the employee's cause of action as suit had been brought against the allegedly negligent party within six months of the award of compensation;[1]
>
> 2. That the insurer had a direct action against the shipowner to recover its compensation liability, which the

[1]But it is clear that the lien concept was the result of the assumed effect of § 933, i.e. that a lien was equitably *needed* because there was no right to sue.

court held was based upon common law tort. This cause of action would be subject to defense by proof of contributory negligence on the part of plaintiff's employer or by plaintiff himself;

3. In the action of the plaintiff/employee against the shipowner, the shipowner could assert a defense of contributory negligence of plaintiff and that of any other employee of the stevedore in reduction of damages which plaintiff might be shown to have suffered as a result of some negligence on the part of the shipowner.

The court held the last conclusion to be compelled by the language of 33 USC 905(b) which states that the employee's action "shall [not] be permitted if the injury was caused by the negligence of persons engaged in providing stevedore services to [the] vessel."[2]

It would appear that the *Shellman* result would require, assuming joint negligence to be proven, that the shipowner pay only plaintiff's actual damages *after* such damages are reduced by a percentage amount for the negligence of plaintiff *and* his co-employees. The opinion might be read to mean, however, that the shipowner has the defense of comparative negligence of plaintiff or any other co-employee of plaintiff in the suit by plaintiff for damages *and* the suit by the stevedore or its insurer for compensation expenses in the common law tort claim to recover the "lien," i.e. that *both* claims would be subject to a percentage reduction for negligence of plaintiff and his co-employees. This

[2]The congressional reports say that ". . . a vessel shall not be liable for acts or omissions of stevedores or employees of stevedores subject to [the] Act," Senate Report No. 92-1125, p. 10 and House Report No. 92-1441, p. 6, and that "the vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." The court's reliance on the language of the Act is misplaced, since it was clearly intended to apply to the *Reed* v. *S. S. Yaka,* 373 U. S. 410 (1963), and *Jackson* v. *Lykes Brothers Steamship Co.,* 386 U. S. 731 (1967), situation.

interpretation is, however, contrary to *Federal Marine Terminal, Inc.* v. *Burnside Shipping Co.,* 394 U. S. 404 (1969) and, by implication, to *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 74 A. M. C. 537 (U. S. Supreme Court, 1974) (not yet officially reported). It would seem contrary to the purpose of the amendments as well. This is not to say that the all or nothing approach to "lien" recovery urged cannot be inequitable in certain cases. The stevedore may lose more (may pay more in compensation) than the degree of its contribution to the joint negligence causing the injury would otherwise require. Thus, if plaintiff's "damages" are $8,000 and the lien $5,000 and the stevedore's negligence 50%, the stevedore would pay more than the shipowner though at fault to the same degree.

On the other hand, if the jury verdict for plaintiff is $11,000 the same "inequitable" result would devolve upon the shipowner.

The chance of a less than perfectly fair outcome is acceptable, however, as an exchange for the simplicity of the procedure urged. Of course, by statute this court cannot do anything directly to balance the potential inequity to the shipowner if plaintiff's damages greatly exceed the "lien." Additionally, the Act provides means for the employer to contest the employee's claim for compensation which are not available to the third party. Moreover, it appears that the duty owed the employee by the stevedore may be higher than that owed by the shipowner. Cf. *Lucas* v. *"Brinkness" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K. G.,* 379 F. Supp. 759 (U. S. D. C. E. D. Pa. 1974). This conclusion is given support by the fact that the employer is bound by the Safety & Health Regulations, not the "third party." Cf. *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.,* 346 F. 2d 481 (2 Cir., 1965), rev'd, 382 U. S. 283 (1965), reh. denied, 382 U. S. 1000 (1966), reh. den., *International Terminal Operating Co., Inc.* v. *N. V. Nederl.*

Amerik Stoomv. Maats., 382 U. S. 1030 (1966), on remand, 279 F. Supp. 635 (S. D. N. Y., 1967), rev., 392 F. 2d 763 (1968), rev., *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968). In discharge of this higher duty it is not unreasonable to require the stevedore to pay more than the shipowner in some percentage of the cases. This is not to say that the stevedore in a proper case would not be able to recover its "lien" in its entirety, even though negligent, on an active hinderance, last clear chance or break in causation claim, as we assume the shipowner would be permitted to defend against the claim of the employee on the same basis. Whether the stevedore now might recover on the basis of noncontractual indemnity or other theory (Cf. *Burnside, supra*, at pp. 418-421 (1969)) is questionable if such indemnity is available to one "passively" negligent. Passive negligence is a difficult concept to manage in the stevedore-shipowner context since the former, by law (the Safety & Health Regulations for Longshoring) cannot be passive in seeing to the maintenance of safe working conditions, and Congress in passing the 1972 Amendments expressed its intention to "ensure" that the cost of unsafe conditions be borne by the employer, without reference to whether the employer or third party caused the condition. In this connection this court's recent decision in *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, Civil No. 74-1344 (filed December 11, 1974), is a step in the right direction.

The "Murray Credit" line of cases was brought to this court's attention merely to illustrate attempts made to resolve the fairness issue implicit in a suit to recover damages for personal injuries sustained as a result of joint negligence of a third party and an employer when the employer at fault is immune from liability but has an interest in its employee's suit.

As we urged in our main brief, manipulation of the concept of joint tortfeasors is another such approach, which has been called the "Pennsylvania Rule." This rule has, perhaps, been best justified in *Newport Air Park* v. *The United States,* 293 F. Supp 809 (D. C. R. I., 1968). Moreover, *Ryan Stevedoring* v. *Pan Atlantic S. S. Corp.,* 350 U.S. 124 (1956), viewed in retrospect, was unquestionably another such attempt.

In *Ryan,* the Supreme Court created a breach of warranty of workmanlike service, which involved use of a legal concept imported from the law of contracts, and thereby created a duty in the stevedore/employer owing to the shipowner by implication where perhaps none existed by consensus between the two parties. The Court decided that stevedores agreed to perform in a workmanlike manner when they, understandably, assumed that their obligation was to be free from negligence, and if more were intended, this would have been provided by appropriate contract or agreement. In addition, *Ryan, Newport Air Park* and the "Murray Credit" cases serve the end not only of more equitably sharing the loss, which is after all a secondary consideration, but, if the basic postulate of all tort law is correct, the primary end of assuring that an employer covered by a compensation act (as virtually every other litigant under our jurisprudence) would be punished for its negligence, so as to serve to strengthen its "incentive to provide the fullest measure of on-the-job safety." House of Representatives Report No. 92-1441, 92nd Congress, 2nd Session.[3]

Of course, the fourth approach which is urged by the shipowner here, to subject the employer's claim for recovery of its damages—its compensation liability—to defeat by

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[3]United States Code, *Cong. and Admin. News,* Vol. 3, pp. 4698-4699. Identical language appears in Senate Report 92-1125.

proof of negligence, is another fairness approach, but one which would work the desired result logically and in a manner which is both simple and symmetrical.

To return to Gulf's assertion of reliance on "Murray Credit," it must be pointed out that in this case no such defense was pleaded in answer to plaintiff's complaint. Since the doctrine affects the right of plaintiff, such a defense would be mandatory.

REPLY TO GULF'S POINT II

We believe in the main brief we demonstrated that flaws in the compensation act impelled the Supreme Court in *Pope & Talbot, supra,* and *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282, 285 (1952), to select from the possible accommodations among the three parties the one which best protected the individual's rights to compensation and damages in a proper case. As we have seen, these rights are now firmly guaranteed and have been since the 1959 amendment to the Act. But Gulf nonetheless now argues in point II of its brief that it has a statutory right to recover its compensation payments. Of course it has, but only six months after an "award" (by virtue of section 933(b)), which is not here the case, as Gulf completely fails to acknowledge. Since section 933 of the Act gives this right in circumstances which do not now exist, the section is of no help to appellee whose right to recover these payments is found either in Section 905(b), as a person otherwise entitled to sue the shipowner for negligence, or by virtue of the maritime law right created by *Burnside, supra.*

REPLY TO GULF'S POINT III

In point III of its brief, Gulf says that the case law requires payment of the so-called lien irrespective of the employer/stevedore's negligence. Gulf also says that "sec-

tion 933 of the Act has not been amended in any way which would affect the Court's decision in Pope & Talbot ...." (Appellee's brief, p. 8). This conclusion does not tolerate close scrutiny.

Why should a stevedore in a longshoreman's personal injury action have a "lien?" Why should the right of such private litigant be special in any way or differ from the right of all others to sue in vindication of a claim for damages flowing from a breach of duty owed by another?

It is clear that the stevedore's "lien" depended on the mistaken assumption that the 1938 amendments to the Act had deprived the stevedore employer of any recourse in law to recover his damages from a third party in a case where those damages had been incurred without a compensation award. It is also easy to see how the lower courts were misled, since the amendment does seem to have worked precisely that result. However, this fact mistakenly assumed, the courts, exercising their general equitable power, then proceeded to create a "lien" which was as a logical necessity treated as one on the proceeds of a successful suit by a compensated employee. This attempt to do equity did not achieve the result desired when a negligent stevedore was permitted by the Supreme Court to recoup the amount of its compensation expenses when equitably it should not. But this result obtained from 1952 to 1956 *only*.

The issue was presented to the Supreme Court on three occasions, *Halcyon, Pope & Talbot* and *Ryan,* in which the Court in its final consideration of the issue changed the inequitable result of its first two holdings so radically that a negligent stevedore not only could not, as a general rule, recover its lien but in addition was required to pay the employee's actual damages above what he was entitled to in compensation, as well as the shipowner's attorney's fee.

Halcyon, Pope & Talbot and *Ryan* must be read together. To do so properly requires that certain facts be borne in mind. First, the *Halcyon* issue was the entitlement of the shipowner to contribution from the stevedore *only because* the Supreme Court assumed that the stevedore had no action at law against the shipowner. Second, on the facts of *Halcyon* and *Pope & Talbot*, the Court believed that the manifest unfairness to the shipowner must abide in order to serve, in the Court's view, the more important end of preserving the employee's right to compensation and damages. We have seen that the Court believed that to subject the "lien" to defeat by proof of stevedore's negligence would have jeopardized one or other of such rights of an injured employee because of the flaws in the language of section 933 before the 1959 amendments to the Act.[4] Third, it cannot be denied that the *Pope & Talbot* result was entirely changed by *Ryan,* a fact which cannot be safely ignored, although Gulf would have this court do so. In this background, Gulf's reliance on *Pope & Talbot* is clearly misplaced, a conclusion which is proven beyond doubt by a reading of the Court's later *Burnside* decision.

REPLY TO GULF'S POINT IV

In Point IV of its answering brief, proceeding on the mistaken assumption that the shipowner relies on the "Murray Credit" doctrine and ignoring the difference between Rules 14 and 19 of the FRCP, Gulf says that the

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[4]The Supreme Court anticipated the remedial effect of the 1959 amendments by its decision in *Czaplicki* v. *The Hoegh Silvercloud,* 351 US 525 (1956). This case, so hard on the heels of *Ryan,* might be evidence of a trade-off—Mr. Justice Black's fears (*Ryan* at pp. 144-147) were allayed in necessary exchange for the then newly achieved more equitable adjustment of the relations between the stevedore and the shipowner.

What is demonstrated with certainty by the *Halcyon* through *Reed* line of cases is that the Court is primarily interested in the *result*. Given the clean slate worked by the 1972 amendments, will it now accept the unfair result reached below?

stevedore would be required to "hire an attorney to defend against the charge of employer negligence." But the stevedore is not defending himself against anything as it acknowledges by designating itself an involuntary plaintiff in this proceeding. Of course, it was gauged from the perspective of its real interest as "plaintiff" in the proceeding below, as one brought in on the basis of the assertion that it had a right to sue and should sue or lose any claim for recovery of its compensation liability. This issue is so obviously not a valid one it would not require comment but for the fact that the court in *Lucas, supra,* apparently believed that *impleading* the stevedore under Rule 14 on a "Murray Credit" basis was a drain on funds available for compensation.[5] This argument essentially is one which proceeds in ignorance of the real status of the three parties. It is the appellee here who is asserting a claim against the shipowner, or if not against the shipowner, against the proceeds of money which the plaintiff may recover from the shipowner as a result of the shipboard injury caused by negligence. We can find nothing in the new Act that requires perpetuation of the erroneous belief that a stevedore's status is so special as to entitle it to recover its

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[5]In *Lucas* the defendants pleaded a "Murray Credit" defense in answer to plaintiffs' complaints in addition to filing Rule 14 third-party complaints against the stevedore on the same basis. The propriety of the *Lucas* shipowners' procedural position *vis a vis* the stevedore is dubious, and it is easy to appreciate that use of the wrong remedy may lead to a wrong result. "Murray Credit" is a *defense* available in the District of Columbia to a third party against claims by an employee and his employer. Rule 14 provides a basis of bringing in one who "is or may be *liable*" to the defendant. The complaint over in *Lucas* could (should?) have been dismissed on procedural grounds. Rule 19 is the appropriate device. The requirement that joinder not disturb subject matter jurisdiction cannot be a problem. Jurisdiction over plaintiff's suit is not based on diversity but on 28 U. S. C. § 1331 (Federal Statute), to wit, 33 USC 905(b). Whether, as here, the joined party and the shipowner are of diverse citizenship is irrelevant since lack of diversity between these two parties cannot deprive the District Court of jurisdiction of "the [plaintiff's] action."

damages in a legal proceeding without effort or expense, even when it has been the principal cause of a shipboard accident.

REPLY TO GULF'S POINT V

In point V of its answering brief, Gulf confuses the exclusive liability provisions of the act with the separate and distinct issue of the recoverability of such liability, once incurred, by the employer or its insurer irrespective of the employer's negligence. A stevedore cannot be liable to anyone directly or indirectly, for *more than* its compensation responsibility, but this is not to say it should be responsible for *any less* when its negligence has caused the injury for which compenation is paid. Gulf's position here, assuming as we must that both the shipowner and stevedore were negligent, is that the shipowner's negligence relieves it of its statutory liability for compensation. As we have seen, this is utterly inconsistent with the stated purpose of the new act—to ensure that the highest standard of on-the-job safety be maintained by requiring the stevedore to bear the cost of unsafe conditions.

Again in point V, appellee urges that the shipowner's argument would result in burdensome, obnoxious and circuitous litigation. This too is not accurate. The pre-amendment alignment of the parties was circuitous and was burdensome because of its very circuity and complexity, not simply by virtue of the presence of three litigants in one proceeding. Much confusion did arise because of the hypothetical nature of the defense of pre-1972 cases where the shipowner would deny the existance of an unseaworthy condition while simultaneously saying that if such condition existed it was the ultimate responsibility of the stevedore. It was this confusion and that engendered by the interplay

of the parallel rights of recovery for unseaworthiness and negligence, different and distinct concepts, both or either of which could create liability which could be transferred, sometimes, but not of necessity, and not necessarily always, by proof of stevedore negligence, which created problems in the trial courts. In the resolution urged by appellant shipowner, the basic issue will be presented to the jury with brutal simplicity—whose fault was the accident, nothing more.

REPLY TO GULF'S POINTS VI AND VII

In points VI and VII of its answering brief, Gulf again misstates the shipowner's argument in claiming that it is admitted that medical expenses are the employee's damages although paid by the employer. The damages of the parties are, it would seem, money expended or lost by them as a result of a compensatible injury. This is the only natural interpretation of the meaning of the word "damages." To treat plaintiff's "damage" claim as what he may be permitted to urge to the jury are his damages, knowing that he is not entitled to double recovery and that he must repay compensation to a non-negligent stevedore, is the artificial and strained interpretation. It is only recovery by the shipowner from the stevedore/employer of plaintiff's *actual* damages which is proscribed by § 905(b) of the Act. If Congress intended otherwise, for example that the stevedore *always* recover its compensation liability from the negligent shipowner, it would have so provided in the Act.

REPLY TO GULF'S POINTS VIII AND IX

In points VIII and IX of its brief, Gulf reduces its own argument to its starkest inequity by demonstrating why a shipowner whose negligence contributes 1% to the

happening of the shipboard accident must shoulder the entire compensation liability of a 99% negligent stevedore.

We do not believe this court wishes that this result be continued.

spectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellant A/S
Arcadia, Defendant and
"Plaintiff" Seeking Joinder
One State Street Plaza
New York, New York 10004

J. WARD O'NEILL
JOSEPH T. STEARNS
RICHARD A. CORWIN
Of Counsel.

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APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. CV 73-1902-R

JOHN SHELLMAN,

Plaintiff,

vs.

UNITED STATES LINES OPERATORS, INC.

Defendant.

Memorandum Opinion

Plaintiff, John Shellman (hereafter Shellman) moves to strike from the answer of defendant United States Lines Operators, Inc. (hereafter USL) the allegations of its answer setting forth the so-called "Murray Credit" doctrine which permits reduction of plaintiff's recovery by reason of the alleged negligence of plaintiff's employer Marine Terminals Corporation (hereafter Marine).

Hartford Accident and Indemnity Company (hereafter Hartford), subrogated to the rights of Marine, has simi-

larly filed a motion to strike the allegations of contributory negligence in the answer of USL to Hartford's complaint in intervention for recovery of the compensation benefits paid to Shellman for injuries suffered while working as a longshoreman on board USL's vessel American Aquarius.

BACKGROUND

In July 1973 USL'S vessel American Aquarius called at Long Beach for the purpose of onloading cargo vans. On July 4, 1973 Shellman was working on board the American Aquarius as a member of a longshore gang lashing the cargo vans which had previously been loaded on board.

While engaged in these lashing activities, Shellman was injured and subsequently filed the instant complaint alleging negligence on the part of USL for its failure to furnish the proper gear for the lashing operations.

USL answered denying negligence and raised several affirmative defenses, including the affirmative defense called into question by the present motion i.e., the application of the so-called "Murray Credit" doctrine which admits to the reduction of Shellman's recovery in light of his receipt of compensation payments from his employer Marine under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 et seq.).

Hartford, as the insurance carrier subrogated to the claims of Marine for payments of compensation to Shellman, has filed a complaint in intervention to recover the compensation payments made to Shellman. In answer to the complaint in intervention, USL has raised as an affirmative defense the alleged contributory negligence of Marine.

Appendix

These motions bring before the court as a matter of first impression the impact of the principle of *Murray* v. *United States,* 405 F. 2d 1361 (D. C. Cir. 1968) upon Shellman's claim, coupled with the impact thereon occasioned by the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 particularly the strictures of §§ 933(b), 933(e)(1)(3) and 933(e)(1)(c).

LONGSHOREMEN CLAIMS PRE *RYAN STEVEDORING, INC.* v. *PAN-ATLANTIC STEAMSHIP CORP.*[1]

The enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927 provided exclusive remedies for the recovery of compensation from his employer for injuries sustained by a longshoreman. The exclusivity of the remedy imposed by the Act was clarified in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) in which the Supreme Court extended the right of a longshoreman to sue the owner of a vessel on which he was working not only for negligence but also for breach of warranty of seaworthiness.

Unresolved by *Sieracki* and precipitated by the increasing number of actions by longshoremen against ship owners the Supreme Court in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.,* 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952) addressed itself to the ability of a shipowner to recover from the employer of an injured longshoreman for injuries aboard his vessel caused solely by or with the concurrence of some negligence on the part of the employer. Rejecting the invitation to extend the doctrine of comparative fault applied in admiralty collision cases to personal injury cases, the court concluded

> . . . because Congress while acting in the field has stopped short of approving the rule of contribution

[1]350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956).

here urged, we think it would be inappropriate for us to do so. *Id.* at 287, 72 S. Ct. at 280-81, 96 L. Ed. at 321.

Persisting in their attempts to shift or share the burden of ship board injuries of longshoremen to their employers, shipowners continually endeavored to obtain contribution from a longshoreman's employer found by the jury to be guilty, together with the ship owner, of negligence proximately causing the longshoreman's injuries.

Pope & Talbot, Inc. v. *Hawn,* 346 U. S. 496, 74 S. Ct. 202, 98 L. Ed. 143 (1953) clarified two principles applicable to longshoremen's[2] ship board injuries.

1. The doctrine of comparative negligence was adopted for uniform application in cases brought by longshoremen as well as seamen for ship board injury actions (maritime torts). *Id.* at 409, 74 S. Ct. at 304-05, 98 L. Ed. at 150-51.

2. The recovery of a longshoreman could not be reduced by the payment of compensation[3] received from the employer nor could the employer be compelled (even if negligent) to contribute by direct action against the employer or by reduction of compensation payments made from the employee's recovery otherwise subject to recoupment under § 33 of the Longshoremen's and Harbor Workers' Compensation Act.[4] *Id.* at 412-413, 74 S. Ct. at 206-07, 98 L. Ed. at 152-53.

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[2]Although Hawn was not technically a longshoreman the Court proceeded upon the theory that the type of work being performed and not the name given to the workman's position was controlling. In so concluding the Court then applied admiralty principles of seaworthiness and negligence.

[3]Under the Longshoremen's and Harbor Workers' Compensation Act.

[4]Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, § 33, 44 Stat. 1440; presently 33 U. S. C. § 933.

Appendix

Such was the law of contribution in admiralty cases until 1956.

THE ALTERATION OF THE LAW ACCOMPANYING *RYAN STEVEDORING CO.* v. *PAN-ATLANTIC STEAMSHIP CORP.*

Not satisfied with mounting costs occasioned by longshoremen's ship board injuries, ship owners turned in new directions to seek contribution by requiring employers of longshoremen to (1) give express agreements of indemnity or, (2) in the absence of express agreements, to press upon the courts the theory of implied warranties of workmanlike performance in the stowage of the ship's cargo.

It was in this posture then that Pan-Atlantic Steamship Corporation (hereafter Pan-Atlantic) was required to pay one Frank Palazzolo (hereafter Palazzolo), a longshoreman employee of Ryan Stevedoring Company (hereafter Ryan) for ship board injuries received by Palazzolo while unloading cargo negligently stowed by Ryan. Pan-Atlantic brought an action by third party complaint to recover the payments to Palazzolo and was successful. *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277 (2d Cir. 1954).

Confident of the law as established in *Halcyon Lines* and *Pope & Talbot, Inc.*, Ryan petitioned for and was granted certiorari by the Supreme Court to clarify (1) whether the Longshoremen's and Harbor Workers' Compensation Act precluded such a shipowner's third party suit and (2) the status of indemnity both express and implied for breach of an obligation of a stevedore to stow cargo in a reasonably safe manner.

The Supreme Court in *Ryan Stevedoring Company, Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 244, 76 S. Ct.

232, 100 L. Ed. 133 (1956) found no impediments to such liability in the Longshoremen's and Harbor Workers' Compensation Act. Thus, the Court reasoned:

> While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractural obligation, voluntarily assumed to the shipowner, to load the cargo properly. The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligation owing *to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act. *Id.* at 131-32, 76 S. Ct. at 236, 100 L. Ed. at 140-41. (emphasis in original) (citations omitted).

The rationale of the Court in rejecting any proscription to third party suits in the Longshoremen's and Harbor Workers' Compensation Act[5] was that such claim was only

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[5]The Court was concerned with Sec. 5 of the Longshoremen's and Harbor Workers' Compensation Act which provides in pertinent part:

> Sec. 5. The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except

a suit upon a contractual relationship (express or implied) between the shipowner and the stevedore and did not originate nor funnel to the shipowner through any right residing in an employee to recover for injuries caused by the negligence of his employer.

Having succeeded in their views of the equitable distribution of liability for the shipboard longshoremen injuries shipowners began almost universally to file third party complaints alleging the breach of express or implied warranty of workmanlike performance of stevedoring duties. Now employers became alarmed at the avalanche of third party suits brought by shipowners. Unsuccessful in the courts to stem the advancing tide of third party litigation, employers turned to Congress for relief.

THE NOW—AND THE "LONGSHOREMEN'S AND HARBOR WORKERS" COMPENSATION ACT AS AMENDED IN 1972

1972 found the Congress restudying the Longshoremen's and Harbor Workers' Compensation Act with two objectives in mind: 1. to increase the benefits to longshoremen for injuries sustained as a result of their employment; and 2. to review the tri-partite litigative relationship between employee—shipowner—employer created by the development of *Sieracki, Halcyon, Hawn,* to *Ryan.*

Amendments made effective November 26, 1972 now bring to the court for scrutiny the attempt of Congress to reconcile the problems of *Sieracki* and *Ryan* as applied to longshoremen's personal injury claims. These amendments

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that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case of death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death . . . 44 Stat. 1426, 33 U. S. C. § 905.

contain what is a wholly new approach to this aspect of admiralty practice. Section 905(b) of the Act (33 U. S. C. § 905 (b)) was added to provide:

> "§ 905. Exclusiveness of liability.
>
> (a) * * *
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

With the legislative history[6] indicating the view of Congress to change the existing benefits and procedures in longshoreman injury cases and to bring some order out of the chaos of third party practice the court must now draw

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[6]S. Rep. No. 1125 92d Cong. 2d Sess. 4 (1972); H. R. Rep. No. 1441, 92d Cong. 2d Sess. 4 (1972); 1972 U. S. Code Cong. & Admin. News 4698 et seq.

some guidelines to reconcile the Congressional purpose with the equitable principles applicable to admiralty practice.

Defendant, USL presses upon the court the application of the so-called "Murray doctrine" announced by the Court of Appeals for the District of Columbia Circuit in *Murray* v. *United States,* 405 F. 2d 1361 (D .C. Cir. 1968). The court in *Murray* considering the exclusivity of remedy provision of the Federal Employees' Compensation Act held that where the injuries to the employee were caused by some concurring negligence of the employer, the injured employee is only entitled to collect one-half of the damages from the third party tortfeasor. The rationale of *Murray* is indicated in this language of the Court:

> "Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in *Martello* v. *Hawley,* 112 U. S. App. D. C. 129, 300 F. 2d 721 (1962). *Martello* holds that where one joint tortfeasor causing injury comprises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had 'bought his peace,' is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery

> of the injured employee is thus reduced in consequence of the epmloyee's compensation Act, but that Act gave his assurance of compensation even in the absence of fault." *Id.* at 1365-66.

Murray cannot be applied here because in spite of the attempt of the court to reach an equitable result, the failure is obvious. *Murray* accomplishes its purpose only where (1) the negligence of the employer is 50%, and, (2) the compensation act recovery is 50% of what a judge or jury finds to be the actual damage suffered by the employees, and (3) no lien is allowed to an offending employer.

Also urged upon the court is the adoption of the holding in *Carlson* v. *Pacific Far East Lines,* 29 Cal. App. 3d 383, 105 Cal. Rptr. 885 (1973) in effect denying "double recovery" by the employee and defeating the employer's compensation lien where the employer's negligence is a concurring factor in the employee's injuries. The court in *Carlson* does, however, circumscribe the applicability of its principles to affect only state compensation lien actions. The court says:

> In those *federal* 'unseaworthiness' cases brought in federal courts, co-tortfeasor employers had paid workmen's compensation benefits to injured workmen under the *federal* Longshoremen's and Harbor Workers' Compensation Act (U. S. C. A., tit. 33 § 901 et seq.). No contention was made that state law applied to those wholly federal actions, matters, and transactions. In each case the losing shipowner argued that the federal courts should adopt a rule of contribution similar to that later announced by California in *Witt* and *Jackson.* The United States Supreme Court declined to adopt such a rule. We

> recognize that the Court in *Pope & Talbot, Inc.*, held that application of the doctrine of contribution would frustrate the purpose of the Longshoremen's and Harbor Workers' Compensation Act. But there again, understandably, the Court was defending the substantive rights of the parties under a federal statute, a consideration which as we have pointed out, has no application to the claim here at issue. *Id.* at 889-90, 105 Cal. Rptr. at 889-90.

Clearly *Carlson* and its adoption of *Witt* v. *Jackson*, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rpter. 369 (1961) has no direct application to longshoremen claims deriving their cause of action from the Longshoremen's and Harbor Workers' Compensation Act and prosecuting that claim in a federal court.

Considering the precedents, the statute and its legislative history some order may be made out of the position of the competing interests in this litigation.

1. Shellman has a cause of action triable by jury for his claimed injuries caused by the negligence of USL (Longshoremen's and Harbor Workers' Compensation Act § 905( ): 33 U. S. C. § 905(b)).

2. Marine and/or Hartford may not pursue its compensation lien claim against USL (Longshoremen's and Harbor Workers' Compensation Act § 15 f-h; 33 U. S. C. § 933(b) (h), as now pleaded for the reason that Shellman (the source of any statutory assignment) has filed suit against USL within six (6) months of the award of compensation.

If Marine and/or Hartford have any direct action against USL it must arise on common law tort theory to which may be interposed a common law defense of con-

tributory negligence. Either the contributory negligence of Marine or of its employee Shellman or both would be the measure[7] of recovery to be applied.

3. In the action of Shellman against USL, USL may claim the contributory negligence of both Shellman and Marine in reduction of any damages Shellman may be shown to have suffered as the result of some negligence on the part of USL.

This conclusion is compelled by the language of the Act, 33 U. S. C. § 905(b):

> . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to its vessel.

4. No theory—statutory or otherwise—can—under the present state of the law—support the reduction of Shellman's claim against USL of any amount of compensation received by reason of the Longshoremen's and Harbor Workers' Compensation Act. The court rejects the "Murray Credit" principle because of its potential for injustice and rejects the *Carlson* case prohibition of "double recovery" because USL is adequately protected by the statutory provision permitting it to present evidence of the contributory negligence of Shellman and Marine (as set forth in paragraph (3) above).

An order shall be entered accordingly.

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[7]Assuming comparative negligence because of the admiralty nature of the underlying claim.

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